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FIRST GENERAL COUNSEL'S REPORT

AUDIT REFERRAL: #02-08
DATE REFERRED: 6/26/02
DATE ACTIVATED: 7/25/02

SENSITIVE

EXPIRATION OF SOL: 2/1/04-5/23/05

SOURCE: AUDIT REFERRAL

RESPONDENTS: Bauer for President 2000, Inc.
and Francis P. Cannon, as Treasurer
Campaign for Working Families PAC
and Amy R. Myers, as Treasurer
Lukens Cook Company
America Direct, Inc.
Moore Response Marketing Services
RST Marketing Associates, Inc

RELEVANT STATUTES/REGULATIONS¹: 2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(a)(2)(A)
2 U.S.C. § 441b(a)
2 U.S.C. § 441a(f)
11 C.F.R. § 100.7(a)(1)(iii)(A) and (B)
11 C.F.R. § 100.7(a)(2)
11 C.F.R. § 100.7(a)(4)
11 C.F.R. § 116.3(a)(b) and (c)
11 C.F.R. § 116.1(e)

INTERNAL REPORTS CHECKED: Audit Documents

FEDERAL AGENCIES CHECKED: None

¹ All of the facts relevant to this matter occurred in 1999 and 2000, prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub L 107-155, 116 Stat 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Federal Election Campaign Act of 1971, as amended (the "Act") or statements of law regarding provisions of the Act contained in this report refer to the Act as it existed prior to the effective date of BCRA. Similarly, all citations to the Commission's regulations or statements of law regarding any specific regulations contained in this report refer to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

1 **I. INTRODUCTION**

2 The Commission audited Bauer for President 2000, Inc. (the "Committee") and Francis P.
3 Cannon, as Treasurer,² in accordance with 26 U.S.C. § 9038(a). The audit covered the period
4 from February 4, 1999 through May 31, 2000. The Commission approved the Audit Report on
5 May 31, 2002. According to the referral, the Committee received impermissible contributions
6 including: 1) an excessive contribution in the form of a mailing list exchange; 2) a prohibited
7 contribution arising from the rental of the Committee's mailing list; 3) an excessive contribution
8 resulting from the purchase of assets by the Committee; and 4) prohibited contributions from
9 corporate vendors for improperly extending credit to the Committee. Attachment 1.

10 **II. FACTUAL AND LEGAL ANALYSIS**

11 **A. DONOR LIST EXCHANGE -- EXCESSIVE CONTRIBUTION**

12 The referral indicates that an exchange of donor lists between the Committee and
13 Campaign for Working Families PAC ("CWF"), a multicandidate political committee associated
14 with the candidate, apparently resulted in an excessive contribution.³ Attachment 1. As
15 discussed below, there is reason to believe that the list exchange resulted in an excessive
16 contribution because the donor lists or portions of lists exchanged were not of equal value.

17 It appears that the Committee and CWF made an oral agreement in early 1999 to
18 exchange donor lists. The candidate formed CWF in 1996 and was listed on CWF letterhead in
19 2000 as the Chairman of CWF.⁴ The candidate is also listed as CWF's chairman on its web

² The Treasurer for the Committee from February 4, 1999 through May 19, 1999 was Constance G. Mackey. The current Treasurer, Francis P. Cannon, was designated on May 20, 1999.

³ Amy R. Myers has been CWF's treasurer since June 5, 2000; previously, Peter Dickinson was CWF's treasurer. The Commission approved the Audit Report finding related to the mailing list exchange

⁴ CWF registered as a political committee with the Commission in November 1996 and qualified for multi-candidate status in August 1997

1 site.⁵ See http://www.cwfpac.com/chairmans_corner.html. The fact that the list exchange was
2 between the candidate's presidential campaign and his leadership PAC indicates that the
3 exchange was not made at arm's length and is one possible indicator that the lists exchanged
4 were not of equal value.⁶

5 **1. List Exchange Process**

6 Although there does not appear to be a written agreement, the list exchange between
7 CWF and the Committee is delineated in a memorandum dated January 22, 1999 between the
8 President of a Committee direct mail vendor, the Lukens Cook Company, and the treasurer of
9 CWF.⁷ Attachment 2. The memorandum states that to "facilitate the exchange process and
10 ensure as few delays as possible" the Committee would receive a complete copy of the CWF
11 donor and non-donor files for use during the exploratory process and any subsequent presidential
12 campaign. In exchange, the Committee was to provide CWF with a complete copy of its donor
13 and non-donor files at the end of the campaign. As discussed below, CWF and the Committee
14 were to pay the cost of providing each other with copies of their donor lists. The CWF names

⁵ If the Commission approves this Office's reason to believe recommendations for this issue, this Office plans to seek additional information during the investigation concerning the relationship between CWF and the Committee.

⁶ In MUR 5181 (Ashcroft 2000), a recent case involving a mailing list, the Commission found reason to believe that Ashcroft 2000 may have accepted an excessive contribution from the candidate's leadership PAC, when the PAC exchanged its mailing list for the candidate's signature on the PAC's fundraising letters. This Office made alternative probable cause recommendations to the Commission based on theories of: 1) affiliation resulting in the committees receiving and making contributions in excess of their shared limits; or 2) the making and receipt of excessive in-kind contributions. MUR 5181 The Commission found probable cause to believe based on the theory of excessive contributions but limited the finding to certain transactions involving the PAC's list rental income rather than the value of the list itself. This case is factually distinguishable from MUR 5181 because it does not involve a candidate's signature, any active involvement by the candidate, or list rental income; rather, it involves an exchange of lists of unequal value.

⁷ The Committee and CWF provided this memorandum in response to subpoenas issued during the audit. The memorandum is from Walter Lukens, President of the Lukens Cook Company to Peter Dickinson, former treasurer of CWF. It describes the operation of the list exchange process but does not itself appear to be a written agreement. Thus, the precise terms of the agreement between CWF and the Committee remain unclear and all of the terms may not be reflected in the January 22, 1999 memorandum.

1 would remain the sole property of CWF and the Committee names would remain the property of
2 the Committee.

3 According to the memorandum, list exchanges between the Committee and CWF would
4 be coordinated through Pinnacle List Company ("Pinnacle"), a list broker, which would keep an
5 "exchange balance history for both donors and non-donors" including sample copy, mail dates
6 and quantities for each Committee usage of CWF files.⁸ *Id.* The memorandum stated that the
7 Committee would submit to Pinnacle a "Request to Mail Form" with proposed copy for each
8 planned mailing. Upon CWF's approval, the Committee would pull "selects" of groups of names
9 from its copy of the CWF donor files, directly paying the cost of pulling these names, and
10 provide an "output count" to Pinnacle. Likewise, the memorandum stated that when CWF
11 received and used the Committee's donor lists at the end of the campaign, it would pull its
12 selects from the Committee's files and directly pay the costs of doing so. *Id.*

13 There appears to be some discrepancy between the language in the memorandum and
14 Pinnacle's subpoena response concerning the extent of Pinnacle's role in these transactions;
15 however, the Committee appears to have ultimately provided an exchange balance to Pinnacle.⁹
16 Pinnacle stated through its President, Holly Ruble, that it did not have responsibility for or access
17 to list usage communications between CWF and the Committee during the campaign.
18 Attachment 6. It stated that it understood that a Committee staff member would track and record
19 list exchanges between the Committee and CWF. Pinnacle explained that it requested the

⁸ An exchange balance history appears to be a running record of the number of names used.

⁹ If the Commission approves this Office's reason to believe recommendations for this issue, this Office will seek additional information to clarify the facts surrounding the list exchange such as the meaning of Pinnacle's statement that it sought to confirm "list exchange balances" the Committee "owed" to CWF, and the statements in the January 22, 1999 memorandum that the Committee and CWF would directly pay the cost of pulling selects from the exchanged donor files.

1 “exchange balance and list usage records” between the Committee and CWF at the end of the
2 Committee’s campaign activity in March 2000 in “an effort to confirm and document the list
3 exchange balances now owed” to CWF by the Committee. Pinnacle provided us with a
4 document it received from the Committee listing information about each Committee use of the
5 CWF donor file including the date and quantity and “shared this exchange transaction history
6 with our client, CWF, by way of their list exchange log.” Pinnacle asserted that it accepted the
7 Committee’s record of these transactions as accurate. Because the exchange balance listed on the
8 document provided by Pinnacle is a total of names used in the separate mailings and is much
9 larger than the total number of names on CWF’s donor list, it appears that some CWF names
10 were used multiple times by the Committee.

11 It appears that CWF gave its files to the Committee soon after the agreement was made.
12 CWF stated that on February 1, 1999 it made available to the Committee the “Campaign for
13 Working Families house list,” containing 87,013 donors and 51,507 non-donors. The exchange
14 balance document provided by Pinnacle lists the first Committee mailing use of the CWF list as
15 occurring on February 5, 1999. According to information obtained in the audit from the *SRDS*
16 *Direct Marketing List Source* (December 1998-December 1999), the CWF rents its mailing list
17 for \$115 per 1000 names and the Committee rents its list for \$130 per 1000 names.¹⁰ It appears
18 that the Committee used CWF’s file 22 times during the period from February 5, 1999 through
19 February 28, 2000, for an aggregate total of 957,338 names, and CWF used the Committee’s

¹⁰ The *SRDS Direct Marketing List Source* refers to cost per 1000 names and does not specifically address the cost for multiple uses of the same name.

1 donor files 8 times from June 2000 through February 2001, for an aggregate total of 174,501
2 names.¹¹

3 **2. The Value of the Mailing Lists**

4 In Advisory Opinion ("AO") 2002-14, the Commission allowed a committee to
5 "exchange its mailing lists or portions of its mailing lists... provided that the lists or the portions
6 of the lists that are exchanged are of equal value." In AO 2002-14, the Commission concluded
7 that the rental or exchange of mailing lists by the Libertarian National Committee ("LNC")
8 would not result in a contribution if certain conditions were met. The Commission noted that the
9 LNC list was developed by the LNC over a period of time, had a unique nature and did not
10 constitute merely a list purchased from other sources. It further noted that the list was developed
11 primarily for the LNC's use for its own political or campaign purposes, and not for sale or lease
12 of the names on the list to others. The lease of the LNC list was only a small percentage of its
13 use of the list. The Commission concluded that under these circumstances, the LNC could
14 exchange its mailing lists or portions of its mailing lists with any organization, including a
15 political committee, provided that the lists or portions of the lists that were exchanged were of
16 equal value, without the exchange resulting in a contribution or transfer subject to the Act.

17 As discussed below, there are several ways that the two mailing lists and the exchanges of
18 those lists can be valued. It would appear, however, that there is no apparent valuation under
19 which this transaction can be considered an exchange of donor lists of equal value. Thus, there is
20 reason to believe that the list exchange was an excessive contribution from CWF to the
21 Committee.

¹¹ Based on the information available to the Audit staff, CWF and the Committee did not use all the names in the respective files each time they used the files. Rather, they chose categories of names (selects) from the complete list. Selects are characteristics that identify segments or subgroups within a list (e.g., veterans).

1 Committee). It further contends that the auditors made "no effort to determine the 'value' of the
2 'future' use of the names expected to be generated by the Committee at the time the exchange
3 agreement was made," but compared "CWF's 'actual use' of the Committee's list versus the
4 Committee's actual use of CWF's list." Attachment 3.

5 The Committee, however, has not provided information to support these assertions such
6 as documentation concerning accepted industry standards, how CWF and the Committee valued
7 their lists at the time of the exchange agreement, the value of CWF's use of the Committee's list
8 in perpetuity, or the parties' expectations about the number of names that would be generated for
9 the Committee's list. Additionally, the Committee has not explained why a list balance was
10 maintained by Pinnacle if the expectations of the parties were that the exchanges would be of
11 equal value, regardless of the number of names used by each party. While there may be some
12 value to providing a list in perpetuity, the Committee has also not addressed the fact that a
13 mailing list's value may deteriorate over time. Finally, the Committee's valuation contention is
14 undermined by the fact that the Committee provided no evidence demonstrating that it provided
15 any names to CWF after May 2001.

16 Turning then to the value of the lists, there are several possible ways to determine the
17 difference in value between the CWF and Committee lists and the consequent amount of CWF's
18 in-kind contribution to the Committee. The auditors calculated the list value based on the
19 disparity in the total number of names used from the two lists: the value of 957,338 CWF names
20 was \$110,094 ($957,338/1000 \times \115) and the value of 174,501 Committee names was \$22,685
21 ($174,501/1000 \times \$130$), so the difference and CWF contribution amount calculated by the
22 auditors was \$87,409 ($\$110,094 - \$22,685$). Alternatively, the value of the lists based upon a one
23 time use of each would be as follows: the value of the CWF list would be ($138,520/1000 \times$

1 \$115) = \$15,929.80 and the value of the Committee list would be $(83,821^{13}/1000 \times \$130) =$
2 \$10,826.53, resulting in a difference and contribution amount of \$5,103.27. Another possible
3 calculation would be to consider the value of a one time use of the entire CWF list compared to
4 the value of that portion of the Committee's list that did not include names derived from CWF's
5 list, because CWF had access to its own list. The value of CWF's list would be \$15,929.80 less
6 the value of the non-CWF portion of the Committee's list, $(25,547/1000 \times \$130) = \$3,321.11,$
7 resulting in a difference and contribution amount of \$12,608.69.¹⁴ Each of these alternative
8 calculations supports the conclusion that the lists or portions of lists exchanged were not of equal
9 value. The primary difference between them is the size of CWF's excessive contribution to the
10 Committee.

11 Therefore, it appears that CWF exchanged its mailing list, or portions of its mailing list,
12 for a Committee mailing list that was not of equal value. CWF made, and the Committee
13 received, an excessive in-kind contribution in the form of the provision of CWF's donor list at
14 less than the usual and normal charge. 2 U.S.C. §§ 441a(a)(2)(A), 441a(f); 11 C.F.R.
15 § 100.7(a)(1)(iii). Accordingly, this Office recommends that the Commission find reason to
16 believe that the Committee accepted an excessive in-kind contribution from CWF in violation of
17 2 U.S.C. § 441a(f). In addition, this Office recommends that the Commission find reason to
18 believe that CWF made an excessive in-kind contribution to the Committee in violation of

¹³ This figure is included in the subsequent agreement between the Committee and the Lukens Cook Company. However, subpoena responses from Lukens Cook Company and the Committee state the number of Committee names exchanged under that agreement was 113,293, including 25,547 that did not originate with CWF. This figure would result in a value of a one time use of the entire Committee list of \$14,728.09. This amount is closer in value to a one time use of the CWF list but still has an unequal value of approximately \$1,200 less than CWF's list.

¹⁴ The Committee reported receipt of a separate \$4,000 contribution from CWF on January 29, 1999. Thus, the excessive portion of CWF's contribution under these calculations would be \$1,000 less than the difference in value.

2 U.S.C. § 441a(a)(2)(A). If the Commission approves these recommendations, this Office intends to do limited discovery (described below in section III.) to clarify the facts surrounding this transaction.

B. RENTAL OF DONOR LIST

The rental of the Committee's donor list to the Lukens Cook Company ("Lukens"), a Virginia corporation, appears to have been commercially reasonable, and we recommend that the Commission find no reason to believe that this transaction resulted in a prohibited contribution in violation of 2 U.S.C. § 441b. The auditors concluded that this transaction resulted in a prohibited contribution from Lukens to the Committee; however, the Commission voted to receive the audit report finding on this matter, without any determination on the merits of the auditors' analysis or interpretation of the law. *See* Attachment 1 at 9.

The Committee and Lukens entered into a written agreement dated December 30, 1999. Attachment 5. They agreed that Lukens would purchase the near-exclusive rental and exchange rights to the Committee's complete donor file¹⁵ for the period from January 15, 2000 through October 1, 2000.¹⁶ *Id.* According to the auditors, Lukens paid \$70,000 for the list on January 3,

¹⁵ It appears that the list exchanged with CWF was the same list, or part of the list, that was rented to Lukens. The agreement states that the Committee donor file consisted of 63,281 donor names and 20,000 non-donor names. Attachment 5. The donor file included donors, non-donors, address information, donation amounts and history, telephone numbers and source codes, as well as monthly updates with corrections, contribution updates and new records. *Id.* According to Lukens, 25,547 of the names on the Committee donor list were not originally obtained from CWF, 32,673 were donors to both the Committee and CWF and 55,073 were donors to CWF. Attachment 7. The Committee's subpoena response stated that the number of Committee names to which Lukens obtained joint ownership was 25,547 and 87,746 names originated with CWF. Thus, there is a discrepancy between the total of 83,281 names in the agreement and the total of 113,293 names in the responses of the Committee and Lukens.

¹⁶ The agreement provided Lukens with the rental and exchange rights to the complete Committee donor file and defines rental and exchange rights as the "exclusive right to market, rent or exchange" the Committee's complete donor file, "either in part or total." Attachment 5. Under the agreement, the Committee reserved the right to exclude 400 donor names. *Id.*

2000.¹⁷ The agreement apparently permitted the Committee to continue to use its own list, though it is not clear whether or how much the Committee continued to use its list during the period of the agreement between January and October 2000. The Committee disclosed year to date receipts of \$877,284.62 in contributions from individuals on its 2000 October Monthly report, which suggests that the Committee continued to solicit contributions using its donor list during this period.

The Committee also agreed to direct organizations that wished to use the list during this period to Lukens or Pinnacle. *Id.* However, Lukens agreed to allow the Committee five full uses of the donor file, which the Committee could use to "fulfill its exchange obligation" to CWF.¹⁸ *Id.* It is not clear if these five uses were in addition to allowing the Committee to use its list or whether the Committee itself was limited to these five uses of its donor list. The agreement also stated that, "[p]er prior agreement," at the termination of the agreement, Lukens retained permanent joint ownership of the portion of the Committee's donor file that did not originate as donors to CWF.¹⁹ *Id.*

Lukens's subpoena response states that the \$70,000 figure in the agreement was based on the fact that another agency approached the Committee treasurer seeking to purchase the rights to the Committee list for 10 months and offering \$70,000 "immediate cash" to the Committee.

¹⁷ Lukens also served as one of the Committee's direct mail vendors. During the audit period, the Committee paid Lukens \$258,699 for direct mail service. Lukens stated in its subpoena response that it provided services to the Committee without a written contract.

¹⁸ These five uses were to occur once a month in May, June, July, August and September 2000. *Id.* The agreement stated that the Committee would require CWF to clear its mail date with Lukens or Pinnacle prior to using the Committee's list. *Id.*

¹⁹ Joint ownership rights meant the right to sell, market, rent, exchange, barter or broker that portion of the Committee's donor file. *Id.* The agreement also specified that Lukens had the right to use the Committee's name and image in promotional materials to market the list and that the Committee would pay \$70,000 to Lukens in the event of a breach of contract. *Id.*

Attachment 7. Lukens agreed to match the amount offered "to protect our business from a competitive agency" and stated that it paid for the list on December 30, 1999. *Id.* Lukens also stated that it had a prior oral agreement with the Committee that gave it joint ownership of unique names generated during the course of its fundraising efforts, except for CWF names, commencing at the end of the campaign. *Id.*

The candidate was still actively campaigning at the time of the Lukens agreement. He received his first matching payment of \$1,969,167 on January 3, 2000, the same date as Lukens paid for the Committee list, according to the Audit staff. The candidate became ineligible when he announced his withdrawal from the race on February 4, 2000. *See* 11 C.F.R. § 9033.6(a).

The agreement between the Committee and Lukens does not appear to have resulted in a prohibited contribution. *See* 2 U.S.C. §441b. This transaction appears to meet the conditions for list rentals or leases delineated in AO 2002-14.²⁰ In AO 2002-14, the Commission noted that the LNC's list was developed primarily for the LNC's use for its own political or campaign purposes, and not for sale or lease of the names on the list to others. The Commission concluded that the LNC could lease its mailing list to any person without making a contribution subject to the limitations and prohibitions of the Act if the following conditions were met: 1) the list, or the leased portion of the list, must have an ascertainable fair market value in the market where it was leased; 2) the list must be leased at the usual and normal charge in a *bona fide*, arm's length transaction, and the list must be used in a commercially reasonable manner consistent with such

²⁰ AO 2002-14 is consistent with prior advisory opinions where the Commission recognized a narrow, limited exception for certain mailing and contributor lists from its general treatment of the sale of an ongoing committee's assets as a form of fundraising resulting in contributions. This exception applied to a political committee's mailing or contributor list that had a unique quality and was developed by the political committee in the normal course of its operations primarily for its own use, rather than as an item to be sold to others as part of campaign fundraising activity if the compensation given to the committee for the list did not exceed the usual and normal charge. *See, e.g.,* AOs 1988-12, 1981-46

1 an arm's length agreement; and 3) the person leasing the list must actually use the names in a
2 reasonable amount of time and in a manner consistent with the fair market price paid. Here, it
3 appears that the Committee developed the list primarily for its own use, not merely as a source of
4 rental income. Indeed, the Committee contended that it raised funds for its first matching fund
5 payment of nearly \$2 million primarily using the mailing list.²¹ See Attachments 3 and 4. The
6 Committee's mailing list was apparently used to obtain contributions and matching funds based
7 on those contributions prior to, during and after the period of time covered by the Lukens
8 agreement. The Committee continued to report contribution receipts in 2000 and 2001, including
9 over \$800,000 during the period covered by the Lukens agreement. In total, the Committee
10 received over \$5 million in matching funds based on contributions it received. It can reasonably
11 be inferred that many of these contributions and associated matching funds were the result of
12 solicitations using the Committee's donor list. The large amount of contributions and matching
13 funds received through the Committee's use of its list dwarfs the \$70,000 Lukens paid for the
14 Committee's list. Therefore, the Committee's donor list appears to have been developed
15 primarily for the Committee's own use, rather than as a source of rental revenue.

16 The fact that many of the names on the Committee list originally came from CWF does
17 not make AO 2002-14 inapplicable. It does not appear to be uncommon for a committee to
18 obtain names from other organizations and use them for its own fundraising.

²¹ In response to the auditors' treatment of this transaction as a contribution, the Committee argued that the list was not developed as a fundraising item but for its own use in the candidate's 2000 Presidential campaign. See Attachment 3. The Committee stated that in order to obtain its first matching funds payment of \$1,969,127, it "had raised at least that amount from contributors, primarily, if not exclusively, by the use of its mailing list." Attachment 4. Thus, the Committee argued that its primary reason for developing the mailing list was to obtain millions of dollars of contributions through direct mail, not for a one-time rental of the list for \$70,000. See *id*. In addition, the Committee contended that the fact that the names were initially obtained from a third party (CWF) does not disqualify them as names developed by the Committee. *Id*. The Committee also argued that the Audit staff misconstrued the arrangement between Lukens and the Committee with respect to the rental of names, but does not explain this assertion.

Moreover, the fact that the Committee entered into this agreement while the candidate was still actively campaigning does not mean that the list was not developed for the Committee's own fundraising use. It appears that the Lukens agreement did not preclude the Committee from continuing to solicit funds using its own list, at least in a limited fashion. In addition, the Committee may have used the list rental as another source of funding for the campaign. Although other campaigns or organizations would have had access to the list of the candidate's contributors, this would not necessarily have had an adverse affect on the candidate's solicitations.

Finally, the Lukens agreement occurred only a month before the candidate withdrew from the race and may have been done in anticipation of terminating his campaign: the candidate withdrew from the campaign on February 4, 2000, approximately one month after Lukens paid for the list on January 3, 2000. Thus the list agreement may have been like a sale of committee assets at the end of the presidential campaign.

It appears that the agreement between the Committee and Lukens meets the various conditions delineated in AO 2002-14. The Committee's list apparently had a fair market value, and it appears that Lukens leased the list at the usual and normal charge. The fact that another agency offered the Committee \$70,000 for a similar agreement over ten months is an indication of the list's value and supports the conclusion that \$70,000 was a reasonable fair market value for the Committee's list. Lukens was a Committee vendor and there is no evidence indicating that the Committee's dealings with Lukens were not *bona fide* arm's length transactions. While the extent of Lukens' use of the Committee's list is not known, Lukens is a direct mail vendor that would reasonably have a use for a donor list, and there is no evidence that it did not use the list in a reasonable time and in a commercially reasonable way.

Therefore, this Office recommends that the Commission find no reason to believe that Bauer for President 2000, Inc. and Francis P. Cannon, as Treasurer, violated 2 U.S.C. § 441b(a). In addition, this Office recommends that the Commission find no reason to believe that the Lukens Cook Company violated 2 U.S.C. § 441b(a).

C. PURCHASE OF ASSETS--EXCESSIVE CONTRIBUTION

It appears that CWF made, and the Committee received, an excessive in-kind contribution in the amount of \$14,372 in the form of an extension of credit paid three and a half months after receipt of the goods. *See* 2 U.S.C. § 441a(a)(2)(A), 441a(f); 11 C.F.R. § 100.7(a)(4). It appears that the Committee took possession of office furniture and supplies from CWF and began using them in March 1999, but did not pay for them for three and a half months, until late June 1999.

The Committee purchased office equipment, furniture, supplies, and printed materials from CWF for \$15,372.²² The original bill of sale for these items was annotated "prepared by CWF 3/16/99" and faxed to the Committee on March 16, 1999. Attachment 8. The original bill of sale was not otherwise dated. CWF faxed a revised bill of sale to the Committee on June 28, 1999. *Id.* On the same date, the Committee paid CWF \$15,372 for these items.²³ *Id.* The Committee's check authorization form states that payment for the "office furniture/supplies" was due on June 28, 1999 and was made in full on the same date.²⁴ *Id.*

The audit referral concludes that this transaction resulted in a contribution from CWF equal to the \$15,372 value of the assets for the period from March 16, 1999 through June 28,

²² The Commission voted to receive this finding, without any determination on the merits of the Audit staff's analysis of the facts or the interpretation of the law

²³ The revision included an additional \$1,246.54 that had been inadvertently excluded from the original bill of sale.

²⁴ In response to the Preliminary Audit Report, the Committee disputed the Audit staff's conclusion and stated that it had not yet located additional documentation, but would continue to make efforts to do so. *See* Attachment 4.

1 1999. Attachment 1 at 9-10. The referral states that CWF had made a \$4,000 contribution to the
2 Committee on January 29, 1999. Thus, the auditors calculated an excessive contribution from
3 CWF to the Committee in the amount of \$14,372. *See* 11 C.F.R. § 100.7(a)(4). During the
4 audit, the auditors requested the terms of the agreement between the two parties and the date the
5 Committee took possession of the assets. In its response, the Committee did not provide the
6 requested documentation concerning the date it took possession of the items at issue, an
7 explanation of the discrepancy between the date on the original bill of sale and the date the
8 Committee paid for the goods, or any statement from CWF indicating when payment was due.

9 It appears that the Committee possessed the assets at approximately the same time that it
10 received the original bill of sale. The Committee was organized in February 1999 and changed
11 its status from an exploratory committee to a full-fledged committee on April 6, 1999.
12 According to audit records, the Committee secured office space on February 5, 1999, made a
13 telephone deposit on February 17, 1999, and rented additional office furniture on February 22,
14 1999. Further, the Committee reported raising individual contributions totaling \$1,369,000 by
15 March 1999. These facts suggest that the Committee took possession of the office equipment,
16 furniture, supplies and printed materials in March 1999 to outfit its office space and carry out its
17 fundraising. The Committee did not pay for these items until June 28, 1999. Therefore, the
18 Committee received a contribution from CWF in the form of an extension of credit, equal to the
19 value of the assets (\$15,372) for the period March 16, 1999 through June 28, 1999.

20 As a multi-candidate committee, CWF could not legally contribute more than \$5,000 to
21 the Committee. 2 U.S.C. § 441a(a)(2)(A). Because CWF had contributed \$4,000 to the
22 Committee in January 1999, it could contribute only an additional \$1,000 under the limit. The
23 three and a half month extension of credit by CWF was a contribution unless the credit was

extended in the ordinary course of business and the terms were substantially similar to extensions of credit to nonpolitical debtors of similar risk and size of obligation. 11 C.F.R. § 100.7(a)(4). The Committee has not provided evidence demonstrating that CWF's transaction with the Committee was in the ordinary course of its business, or that its apparent credit terms, no down payment and full payment after three and a half months, were substantially similar to CWF's extensions of credit to any nonpolitical debtors. In addition, CWF is a leadership PAC established and chaired by the candidate, as discussed above in section II. B. 1.; thus, this transaction does not appear to have been at arm's length. These facts support finding reason to believe that this transaction was a contribution from CWF to the Committee, which exceeded CWF's contribution limitation by \$14,372.

Therefore, this Office recommends that the Commission find reason to believe that the Committee received an excessive contribution from CWF in the amount of \$14,372 in violation of 2 U.S.C. § 441a(f). Further, this Office recommends that the Commission find reason to believe that CWF made an excessive contribution to the Committee in the amount of \$14,372 in violation of 2 U.S.C. § 441a(a)(2)(A).

Nevertheless, we do recognize that CWF appears to have provided a second bill of sale to the Committee in an attempt to obtain payment, and the Committee paid CWF in full by June 28, 1999. In a similar situation in MUR 5376, the Commission found reason to believe that Quayle 2000, Inc. received an excessive contribution from a multicandidate committee chaired by the candidate but took no further action. That matter concerned a payment of \$58,906 for furniture, computer and telephone equipment paid more than six months after the Quayle committee received the goods. The amount at issue here, \$15,372, is smaller than in MUR 5376 and was outstanding for a shorter period of time, three and a half months. Therefore, in consideration of

1 the Commission's resources and priorities, this Office recommends that the Commission take no
2 further action against the Committee and CWF for these violations.

3 **D. EXTENSIONS OF CREDIT -- CORPORATE CONTRIBUTIONS**

4 The Audit Division referred apparent prohibited contributions to the Committee in the
5 form of extensions of credit from three direct mail vendors: America Direct, Inc.; RST Marketing
6 Associates, Inc. ("RST"); and Moore Response Marketing Services ("Moore").²⁵ Attachment 1.
7 These vendors provided direct mail services to the Committee for which they were not fully paid
8 in a timely manner. Thus, the auditors concluded that these vendors made, and the Committee
9 received, prohibited contributions. In response to the Preliminary Audit Report, the Committee
10 disputed that it received an in-kind contribution from these vendors or that credit was extended
11 outside the ordinary course of business. It stated that it had sought documentation concerning
12 these transactions, but had not yet been able to obtain it. *See* Attachment 3. The Committee
13 asserted that the conclusion that these extensions of credit were not in the ordinary course of
14 business conflicts with thirty-years of information in the Commission's files concerning
15 presidential committees and vendors. *See* Attachment 3.

16 The extension of credit by any person is a contribution unless it is extended in the
17 ordinary course of business and the terms are substantially similar to extensions of credit to
18 nonpolitical debtors of similar risk and size of obligation. 11 C.F.R. § 100.7(a)(4). If a creditor
19 fails to make a commercially reasonable attempt to collect the debt, a contribution will result.
20 *Id.*; *see* 11 C.F.R. § 116.3 and 116.4. Although corporate contributions are prohibited, 2 U.S.C.
21 § 441b(a) and (b), an extension of credit by an incorporated commercial vendor to a candidate or
22 political committee will not be considered a contribution provided the terms are substantially

1 similar to its extensions of credit to nonpolitical debtors that are of similar risk and size of
2 obligation, and the credit is extended in the ordinary course of the commercial vendor's business.
3 11 C.F.R. § 116.3(a) and (b), *see* § 116.1. To determine if credit was extended in the ordinary
4 course of the commercial vendor's business, the Commission will consider: 1) whether the
5 commercial vendor followed its established procedures and its past practice in approving the
6 extension of credit; 2) whether the commercial vendor received prompt payment in full if it
7 previously extended credit to the same candidate or political committee; and 3) whether the
8 extension of credit conformed to the usual and normal practice in the commercial vendor's trade
9 or industry. 11 C.F.R. § 116.3(c).

10 This Office recommends that the Commission make reason to believe findings and
11 approve a limited investigation of these transactions. The amounts at issue are substantially
12 larger than the CWF extension of credit discussed above or the amount at issue in MUR 5376
13 (Quayle), and some amounts are still owed to these vendors; thus, we believe investigation is
14 warranted. These transactions involve commercial vendors and there is no indication that any of
15 these transactions were not made at arm's length. Additional information obtained through
16 discovery will clarify the facts and may ultimately reveal that some of these transactions were
17 extensions of credit in the ordinary course of business.²⁶

²⁶ The Commission found reason to believe against two vendors and the Committee in MUR 5046 (Clinton/Gore) for improper extensions of credit but took no further action against those respondents. The Commission also found no reason to believe against one vendor and Clinton/Gore for improper extensions of credit. With respect to those transactions, the debt was paid in full and some attempts had been made to collect the debt. In MUR 4989 (Dole), the Commission found no reason to believe against one vendor and the Dole Committee for improper extensions of credit. In that matter, the vendor provided substantial documentation of its efforts to collect the debt. In addition, in MUR 5173 (Republicans for Choice), the Commission found reason to believe that several vendors violated 2 U.S.C. § 441b(a) where the Republicans for Choice committee reported debt forgiveness by those vendors. The Commission took no further action against some vendors because of the amounts involved and the fact that one vendor was out of business. The Commission eventually took no further action with respect to the remaining vendors after additional information revealed that the reports were in error and the vendors had not forgiven the debts.

1 **1. America Direct, Inc.**

2 America Direct, Inc. served as a direct mail vendor for the Committee. The Committee
3 received invoices from America Direct for the services it provided. The invoices noted that the
4 Committee's payments were "due on receipt" or "net 30."²⁷ The audit revealed that eight
5 invoices remained outstanding for an excessive period. Five invoices totaling \$108,071, dated
6 between February 17, 1999 and April 1, 1999, were paid by a single check on July 27, 1999.
7 Prior to payment, the invoices were outstanding for 117 to 160 days.²⁸ Two invoices in the
8 amounts of \$62,579 and \$31,328 were dated December 6, 1999. The Committee paid the first
9 invoice (\$62,579) in two installments: a payment of \$33,000 on May 31, 2000, 177 days
10 subsequent to the date of the invoice, and a payment of \$29,579 on July 24, 2000, 231 days after
11 the date of the invoice. The second invoice (\$31,328) was paid on April 19, 2000, 135 days after
12 the date of the invoice. The final invoice (\$57,884) was dated December 28, 1999 and was paid
13 on June 30, 2000, 185 days after the date of the invoice.

14 There is no available evidence that America Direct sent follow-up invoices or made
15 additional attempts to collect the amounts due. The Committee reported the amounts due as
16 debts. Although the referral discusses amounts that have been fully paid to America Direct, the
17 Committee's July 2003 Quarterly Report discloses a debt of \$35,889.42 owed to America Direct,
18 which may reflect a subsequent extension of credit to the Committee.

19 The extension of credit by America Direct appears to be a prohibited corporate
20 contribution. 2 U.S.C. § 441b. Although America Direct is a commercial vendor, the

²⁷ "Net 30" means payment is due within 30 days.

²⁸ Based on its general audit procedure, the Audit staff used the date of the invoice to calculate the number of days the debt was outstanding. For a few undated invoices, the Audit staff used the receipt date to calculate the number of days the debt was outstanding.

Committee has not provided evidence that America Direct's extension of credit to the Committee was in the ordinary course of business, on terms that were substantially similar to its extension of credit to nonpolitical debtors of similar risk and size of obligation. 11 C.F.R. §§ 100.7(a)(4), 116.3(b). The Committee has provided no evidence that America Direct followed its established procedures and past practice or that the extension of credit conformed to the usual and normal practice in the direct mail industry. 11 C.F.R. §§ 100.7(a)(4), 116.3(b). For example, there is no evidence of collection efforts by this vendor or information about its collection policies and practices, advance payment policies, or billing cycles for nonpolitical debtors. Further, it appears that America Direct may have continued to extend credit to the Committee despite not receiving prompt payment of prior extensions of credit. *Id.* Thus, it appears that America Direct, Inc.'s extension of credit to the Committee was not in the ordinary course of business.

Therefore, this Office recommends that the Commission find reason to believe that America Direct, Inc. made a prohibited contribution in the amount of \$259,862 for the period the invoices remained outstanding in violation of 2 U.S.C. § 441b(a). This Office further recommends that the Commission find reason to believe that the Bauer for President 2000, Inc. and Francis P. Cannon, as Treasurer, accepted a prohibited contribution from America Direct in violation of 2 U.S.C. § 441b(a).

2. RST Marketing Associates, Inc.

RST also provided direct mail services to the Committee and billed the Committee \$1,149,315. Terms noted on the invoices indicated that payment was "due in 30 days." Twelve invoices from this vendor, totaling \$342,613, were not paid timely. Seven invoices, in amounts ranging from \$1,500 to \$12,000, remained outstanding between 134 to 164 days.²⁹ The

²⁹ The first outstanding invoice for this vendor was February 2, 1999.

1 remaining five invoices, in amounts between \$40,000 and \$93,000, remained outstanding
2 between 103 and 195 days. Based on records made available to the Audit staff and discussions
3 with Committee representatives, it does not appear that RST sent subsequent invoices or made
4 additional attempts to collect the amounts due.³⁰ The referral discusses amounts that have been
5 paid to this vendor; however, the Committee's July 2003 Quarterly Report discloses a debt of
6 \$26,531.97 owed to RST, which might indicate a subsequent extension of credit to the
7 Committee.

8 RST's extension of credit appears to be a prohibited corporate contribution to the
9 Committee. 2 U.S.C. § 441b. The Committee has not provided evidence that RST's extension
10 of credit to the Committee was in the ordinary course of business, on terms that were
11 substantially similar to its extension of credit to nonpolitical debtors of similar risk and size of
12 obligation. 11 C.F.R. §§ 100.7(a)(4), 116.3(b). The Committee has provided no evidence that
13 RST followed its established procedures and past practice or that the extension of credit
14 conformed to the usual and normal practice in the direct mail industry. 11 C.F.R. §§ 100.7(a)(4),
15 116.3(b). For example, there is no evidence of collection efforts by this vendor or information
16 about its collection policies and practices, advance payment policies, or billing cycles for
17 nonpolitical debtors. It also appears that RST may have continued to extend credit to the
18 Committee despite not receiving prompt payment of prior extensions of credit. *Id.* Thus, it
19 appears that RST's extension of credit to the Committee was not in the ordinary course of
20 business.

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³⁰ The Committee reported the amounts as debts owed by the Committee on Schedules D-P, (Debts and Obligations).

1 Therefore, this Office recommends that the Commission find reason to believe that RST
2 Marketing Associates, Inc. made a prohibited contribution in the amount of \$342,613 for the
3 period the invoices remained outstanding in violation of 2 U.S.C. § 441b(a). This Office also
4 recommends that the Commission find reason to believe that the Bauer for President 2000, Inc.
5 and Francis P. Cannon, as Treasurer, accepted a prohibited contribution from RST Marketing
6 Associates, Inc. in violation of 2 U.S.C. § 441b(a).

7 **3. Moore Response Marketing Services**

8 The Committee also did not pay timely portions of two invoices totaling \$124,089 owed
9 to another corporate vendor of direct mail services, Moore. The terms noted on both invoices
10 were "payable on receipt." The first invoice, for \$408,001, was dated November 11, 1999. The
11 Committee made four timely payments totaling \$293,956, leaving a balance of \$114,045. The
12 Committee subsequently paid \$30,000 (May 23, 2000) and \$20,000 (July 3, 2000) on this
13 invoice; however, these payments were made between 194 and 235 days subsequent to the date
14 of the invoice. At the end of audit fieldwork, the outstanding balance was \$64,045, which was
15 disclosed as a debt owed. As of the 2003 July Quarterly Report, the Committee still owes Moore
16 \$37,045. The second invoice from Moore was dated August 4, 1999 in the amount of \$11,713.
17 The Committee's initial payment of \$1,669 was timely. However, the Committee did not pay the
18 remaining balance of \$10,044 until February 14, 2000, 194 days after the date of the invoice.

19 Although the auditors found no evidence that the other vendors made any attempt to
20 collect their debts, on September 7, 2000, Moore submitted an invoice and payment history to the
21 Committee that reflected a \$64,045 outstanding balance. Other than this statement, however, it
22 does not appear that the vendor sent subsequent invoices or made additional attempts to collect
23 the amounts due.

1 Moore's extension of credit appears to be a prohibited corporate contribution to the
2 Committee. 2 U.S.C. § 441b. The Committee has not provided evidence that Moore's extension
3 of credit to the Committee was in the ordinary course of business, on terms that were
4 substantially similar to its extension of credit to nonpolitical debtors of similar risk and size of
5 obligation. 11 C.F.R. §§ 100.7(a)(4), 116.3(b). The Committee has provided no evidence that
6 Moore followed its established procedures and past practice or that the extension of credit
7 conformed to the usual and normal practice in the direct mail industry. 11 C.F.R. §§ 100.7(a)(4),
8 116.3(b). Other than one follow-up invoice, there is no evidence of collection efforts by Moore
9 or information about its collection policies and practices, advance payment policies, or billing
10 cycles for nonpolitical debtors. In addition, the Committee has still not paid Moore in full.
11 Thus, it appears that Moore's extension of credit to the Committee was not in the ordinary course
12 of business.

13 Therefore, this Office recommends that the Commission find reason to believe that
14 Moore Response Marketing Services made a prohibited contribution in the amount of \$124,089
15 for the period the invoices remained outstanding in violation of 2 U.S.C. § 441b(a). This Office
16 also recommends that the Commission find reason to believe that the Bauer for President 2000,
17 Inc. and Francis P. Cannon, as Treasurer, accepted a prohibited contribution from Moore
18 Response Marketing Services in violation of 2 U.S.C. § 441b(a).

19 **III. PLAN FOR FURTHER ACTION/INVESTIGATION**

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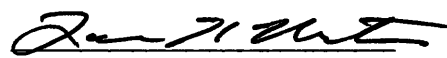
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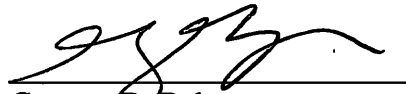
IV. **RECOMMENDATIONS**

1. Open a MUR;
2. Find reason to believe that Bauer for President 2000, Inc. and Francis P. Cannon, as treasurer accepted excessive in-kind contributions from the Campaign for Working Families PAC in the form of the exchange of mailing lists or portions of mailing lists of unequal value in violation of 2 U.S.C. § 441a(f);
3. Find reason to believe that Campaign for Working Families PAC and Amy R. Myers, as treasurer, made excessive in-kind contributions to Bauer for President 2000, Inc. in the form of the exchange of mailing lists or portions of mailing lists of unequal value in violation of 2 U.S.C. § 441a(a)(2)(A);
4. Find no reason to believe that Bauer for President 2000, Inc. and Francis P. Cannon, as treasurer received a prohibited contribution from the Lukens Cook Company in violation of 2 U.S.C. § 441b(a);
5. Find no reason to believe that the Lukens Cook Company made a prohibited contribution to Bauer for President 2000, Inc. in violation of 2 U.S.C. § 441b(a);
6. Find reason to believe that Bauer for President 2000, Inc. and Francis P. Cannon, as Treasurer received an excessive contribution from Campaign for Working Families

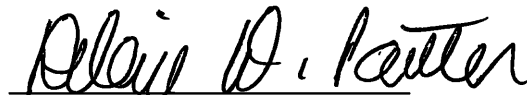
- 1 PAC in the form of an extension of credit in violation of 2 U.S.C. § 441a(f), but take
2 no further action;
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4 7. Find reason to believe that Campaign for Working Families PAC, and Amy R. Myers,
5 as treasurer, made an excessive contribution to Bauer for President 2000, Inc. in the
6 form of an extension of credit in violation of 2 U.S.C. § 441a(a)(2)(A), but take no
7 further action;
8
9 8. Find reason to believe that Bauer for President 2000, Inc. and Francis P. Cannon, as
10 Treasurer accepted prohibited contributions from America Direct, Inc. in violation of
11 2 U.S.C. § 441b(a);
12
13 9. Find reason to believe that America Direct, Inc., made prohibited contributions to
14 Bauer for President 2000, Inc. in violation of 2 U.S.C. § 441b(a);
15
16 10. Find reason to believe that Bauer for President 2000, Inc. and Francis P. Cannon, as
17 Treasurer accepted prohibited contributions from RST Marketing Associates, Inc. in
18 violation of 2 U.S.C. § 441b(a);
19
20 11. Find reason to believe that RST Marketing Associates, Inc. made prohibited
21 contributions to Bauer for President 2000, Inc. in violation of 2 U.S.C. § 441b(a);
22
23 12. Find reason to believe that Bauer for President 2000, Inc. and Francis P. Cannon, as
24 Treasurer accepted prohibited contributions from Moore Response Marketing
25 Services in violation of 2 U.S.C. § 441b(a);
26
27 13. Find reason to believe that Moore Response Marketing Services made prohibited
28 contributions to Bauer for President 2000, Inc. in violation of 2 U.S.C. § 441b(a);
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30 14. Authorize the use of compulsory process, including the issuance of appropriate
31 subpoenas to Bauer for President 2000, Inc., Campaign for Working Families PAC,
32 Lukens Cook Company, Pinnacle List Company, America Direct, Inc., Moore
33 Response Marketing Services, and RST Marketing Associates, Inc., and appropriate
34 subpoenas, including deposition subpoenas, to any subsequently identified witnesses;
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36 15. Approve the attached Factual and Legal Analyses.
37
38 16. Approve the appropriate letters.
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41
42

43 10/28/03
44 Date

45 
46 Lawrence H. Norton
General Counsel


Gregory R. Baker
Acting Associate General Counsel

LORENZO HOLLOWAY BY GAB
Lorenzo Holloway
Assistant General Counsel


Delanie DeWitt Painter
Attorney

Susan L. Kay
Attorney

Attachments:

1. Audit Referral Materials related to Bauer for President 2000, Inc.
2. Memorandum from Walter Lukens to Peter Dickinson, "Exchanges between Campaign for Working Families and Bauer for President Exploratory Committee" dated January 22, 1999
3. Committee's response to Preliminary Audit Report
4. Committee's additional submission dated May 21, 2002
5. Agreement between Lukens Cook Company and Bauer for President 2000, Inc., dated December 30, 1999
6. Pinnacle List Company subpoena response dated May 10, 2001
7. Lukens Cook Company subpoena response dated May 15, 2001
8. Documentation of Purchase of Assets from Campaign for Working Families Including Check Authorization Form, Check and Invoices
9. Factual and Legal Analyses A-C (sample for vendor for extensions of credit)